BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROBERTA M. EICHENBERGER	)	
Claimant	)	
	)	
VS.	)	
	)	
CLARCOR AIR FILTRATION	)	
Respondent	)	Docket No. 1,051,524
	)	
AND	)	
	)	
PHOENIX INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the April 21, 2011 preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh.

ISSUES

The Administrative Law Judge (ALJ) found that the record failed to prove a personal injury arising out of and in the course of employment with respect to the right shoulder and cervical spine and therefore denied claimant's request for medical treatment for those conditions.[1]

The claimant requests review of this decision arguing that her neck and shoulder complaints are related to her work, as evidenced by the medical opinion of Dr. Peter Bieri and claimant's own testimony. Claimant asks the Board to reverse the ALJ's Order and grant her medical treatment for her neck and shoulder complaints.

Respondent argues that the ALJ should be affirmed as the testimony and medical evidence support the ALJ's conclusion that claimant failed in her burden of proof.

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[1] Claimant also alleges injury to both her thumbs and respondent has provided that treatment without objection.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

The ALJ's Order correctly and accurately sets forth the facts and circumstances surrounding claimant's alleged series of repetitive injuries to her bilateral thumbs, right shoulder and cervical spine. Rather than unnecessarily repeat that recitation, this Board Member adopts that recitation as her own.

As the ALJ noted, claimant testified as to the nature of her work duties in her job at respondent's manufacturing plant and her perceptions as to the toll those work duties took upon her body. She complained of pain in both hands, the right shoulder and her neck *"which would increase while she was working and decrease after she quit working*" for the week.[2] And although claimant lives on a working farm, her physical involvement in the daily activities on the farm have decreased in recent years as her children have gotten older.

Four different physicians have weighed in on the claimant's condition, her symptoms and the source of those complaints. Dr. Chris Fevurly, Dr. E. Bruce Toby and Dr. Adrian Jackson each had slightly different diagnoses for claimant's neck and shoulder complaints, but they each believed that claimant's complaints (exclusive of the thumb complaints) were generally a consequence of living and aging, not due to repetitive motion or would have occurred regardless of repetitive work activities.[3] In contrast, Dr. Bieri opined that claimant's symptoms were "consistent with a work related injury, including but not limited to chronic cervical strain, possible right rotator cuff injury, entrapment neuropathy of the right upper extremity and changes in the joints of both thumbs."[4]

After considering these opinions, the ALJ denied claimant's request for medical benefits as he concluded she had failed to satisfy her burden of establishing that she sustained an accidental injury arising out of and in the course of her employment. In other words, he was not persuaded her complaints were not causally related to her work activities.

A claimant in a workers compensation proceeding has the burden of proof to establish by a preponderance of the credible evidence the right to an award of

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[2] ALJ Order (Apr. 21, 2011) at 1.

[3] *Id.* at 1-2.

[4] *Id.*; P.H. Trans., Cl. Ex. 1 at 2.

compensation and to prove the various conditions on which his or her right depends.[5] A claimant must establish that his personal injury was caused by an "accident arising out of and in the course of employment."[6] The phrase "arising out of" employment requires some causal connection between the injury and the employment.[7] The existence, nature and extent of the disability of an injured workman is a question of fact.[8] A workers compensation claimant's testimony alone is sufficient evidence of the claimant's physical condition.[9]

This Board Member has closely scrutinized the medical reports and considered the claimant's testimony and finds the ALJ's preliminary hearing Order should be reversed. While it is true that 3 of the 4 physicians who have spoken to the ultimate issue of the causal connection between claimant's complaints and her work activities have concluded, in one way or another, that her condition or complaints would have occurred anyway, independent of her work duties, those opinions do not necessarily address the ultimate question.

Claimant's own testimony is that after a work day, her neck and shoulder hurts. That pain subsides after work concludes, but returns again once she begins performing her work duties. And after a weekend off, her symptoms will nearly disappear only to re-emerge once she returns to work. This alone strongly suggests that work is, at a minimum, aggravating her condition.

It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.[10] The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.[11]

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[5] K.S.A. 44-501(a); *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

[6] K.S.A. 44-501(a).

[7] *Pinkston v. Rice Motor Co.*, 180 Kan. 295, 303 P.2d 197 (1956).

[8] *Armstrong v. City of Wichita*, 21 Kan. App. 2d 750, 907 P.2d 923 (1995).

[9] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

[10] *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984)*; Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

[11] *Hanson v. Logan U.S.D. 326*, 28 Kan. App.2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App.2d 510, 949 P.2d 1149 (1997).

Dr. Bieri's report notes that claimant demonstrated palpable muscle spasm during her examination along with some decreased, self-limited range of motion. He concluded she requires additional evaluation and treatment for these complaints and this Board Member is persuaded by his suggestion.

The fact that the three other physicians attribute her complaints to a condition that would have occurred even though she was working ignores the uncontroverted fact that work plays a significant and real part in the aggravation of her daily symptoms. And ignores the precedent of well-established case law that an aggravation is compensable under Kansas law. Claimant describes a repetitive job, one that is her success is based upon output. In performing these duties, she notices an increase in her physical symptoms. When she stops these activities her symptoms decrease. This Board Member finds that this testimony, coupled with Dr. Bieri's testimony satisfies claimant's evidentiary burden at this juncture of the proceedings.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.[12] Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated April 21, 2011, is reversed and claimant's request for medical treatment to her neck and right shoulder is granted.

IT IS SO ORDERED.

Dated this _____ day of June 2011.

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JULIE A.N. SAMPLE
BOARD MEMBER

c: Geoffrey Clark, Attorney for Claimant
John F. Carpinelli, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge

[12] K.S.A. 44-534a.

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ORDER NUNC PRO TUNC

This order is to correct a clerical error made in the Board's decision in this case the date of the decision should have read the **25th day of May 2011** and not June 2011.

IT IS SO ORDERED.

Dated this _____ day of June 2011.

_____
JULIE A.N. SAMPLE
BOARD MEMBER

c: Geoffrey Clark, Attorney for Claimant
John F. Carpinelli, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge